MOTION FILED
JUN 20 1983

No. 82-1401

IN THE

Supreme Court of the United States

October Term, 1982

IAIN CALDER and JOHN SOUTH,

Appellants,

vs.

SHIRLEY JONES,

Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE*

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MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Association of American Publishers, Inc. ("AAP") hereby seeks leave of this Court to file a brief as *amicus curiae*, pursuant to Rule 36 of the Rules of this Court, in support of appellants Iain Calder and John South, urging reversal of the decision of the court below insofar as that decision held First Amendment considerations to be irrele-

vant to the determination of *in personam* jurisdiction questions involving employees of a publisher charged with libelous activity. This motion is necessitated by the refusal of counsel for appellee, Shirley Jones, to grant permission to file such brief. AAP's brief, conditionally filed herewith, is annexed to this motion.

Interest of the *Amicus*

The AAP is the major national trade association for book publishers in the United States. Its more than 300 members include commercial and non-profit book publishers, both large and small, university presses and scholarly associations. AAP's member publishers market their books to a wide variety of customers (among them bookstores, schools, universities and libraries) in a variety of markets—both national and regional— across the country. Despite this diversity, all of AAP's members share a firm commitment to the First Amendment, which, as this Court has well stated, seeks to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 476, 484 (1957).

AAP's members all too often feel the sting of defamation lawsuits—actions which, as this Court also has recognized, frequently are brought, not to vindicate injured reputation, but to punish unpopular expression. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 349-50 (1974). In such circumstances, libel suits threaten to achieve the antithesis of that which the Constitution protects and this Court has sought to preserve and encourage: ". . . a profound national com-

mitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Such libel actions continue to exact a heavy toll on the publishing process, notwithstanding the welcome protections afforded publishers by the constitutional safeguards developed in *New York Times* and its progeny. Publishers, along with their authors, editors, and other creative collaborators, are thus, with alarming frequency:

— subjected to lawsuits seeking enormous and potentially ruinous actual and punitive damages awards;

— required to defend such lawsuits through motions to dismiss, vigorous and intrusive discovery, and, in many cases, summary judgment motions, trials and inevitable appeals;

—diverted in their energies and financial resources from the business of publishing; and

— compelled to justify, in the face of such attacks, the publication of hard-hitting and controversial commentary in which it is their constitutional privilege to engage, but for which they may pay dearly.

The rationale of the decision below—reading the First Amendment out of the jurisdictional inquiry in a libel suit*—will, if affirmed by this Court, only serve further to

* While AAP recognizes that the jurisdictional issue before the court below involved solely the president of the publisher and the author of the allegedly libelous article, and not the publisher itself, the sweeping rationale of the decision—and its square rejection of authority dealing with the First Amendment rights of both publishers and their employees—threaten directly the First Amendment rights of AAP's member publishers.

encourage libel actions that would defeat the carefully crafted constitutional protections afforded the publishing process by this Court, and to inhibit publishers and those engaged with them in the publishing process from fulfilling their constitutional duty of "shed[ding] . . . light on the public and business affairs of the nation. . . . *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

In effectively equating publishers, their authors, editors and employees, for purposes of determining *in personam* jurisdiction in the libel setting, with manufacturers of automobiles, appliances and cans of food, and mechanistically applying this Court's due process standards—as developed in such different settings—without regard to the countervailing constitutional interests at stake, the court below totally failed to exhibit any sensitivity to the crucial role of the press in our society or to the likely consequences of its decision on the vitality of that role. Much as this Court has developed constitutional protections for the press dealing with standards of liability and damage awards in libel suits, AAP submits that this Court should likewise now rule that a state's jurisdictional inquiry, in connection with a libel suit against an out-of-state publisher and/or its authors or employees, must exhibit special solicitude to the First and Fourteenth Amendments, *i.e.*, to the likely impact of the outcome of that inquiry on the workings of a free press.

In the annexed brief we discuss from the perspective of book publishers—small and large, regional and national—the untoward implications for the publishing process of the rule adopted by the court below. We therefore respect-

fully request that AAP's motion for leave to file the annexed brief be granted.

Respectfully submitted,

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BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *amicus curiae* is set forth in the preceding motion papers.

Statement of the Case

This action was commenced in the Superior Court of the State of California, Los Angeles County, by Shirley Jones and Marty Ingels, entertainers who reside in California, as a result of an article which appeared in the October 9, 1979 issue of the National Enquirer. The article was written by John South, who is employed by the Enquirer, and its preparation was generally overseen by Iain Calder, the Enquirer's president and editor. Both Calder and South reside and work in the State of Florida, where the Enquirer has its headquarters. Calder had no contacts with the State of California in connection with the publication of the article other than the fact that he knew that it would be distributed in California (and in every other state in which the Enquirer is sold). South's sole contacts with California in connection with the article consisted of four telephone calls into the state, including one in which he read the article to Ingels prior to its publication, and one trip to California which was related in part to the article.

The National Enquirer did not contest the assertion of jurisdiction by the California court. Calder and South, however, appeared specially and moved to quash service of process on the ground that the court lacked personal jurisdiction over them.

The Decisions Below[1]

As required by the holding of this Court in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), the Superior

[1] Page references to the lower court decisions are as appearing in the appendices to Appellants' Statement as to Jurisdiction.

Court examined the defendants' contacts with the forum state. In weighing relevant factors, the court concluded that:

> [I]f the injury complained of in this case involved a physical injury sustained as a result of a physically defective magazine shipped into California, then the analysis would end at this point and the motion to quash would be denied. [17a]

However, relying upon well-reasoned authority, the court determined that "because the case involves First Amendment freedom of expression and because the defendants sought to be brought into this jurisdiction are employees of the publisher," *id.*, it was necessary further to weigh "First Amendment considerations . . . in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action." (18a)

Weighing those First Amendment considerations, the Superior Court concluded that the exercise of jurisdiction over the author and editor would have an impermissible chilling effect upon them and accordingly determined not to compel them to appear to defend the actions. As the court noted:

> Few would be willing to risk writing or editing controversial articles for national publications if they could be required personally to appear in remote jurisdictions as individual defendants and possibly suffer judgments for punitive damages, and surely pay unlimited litigation expenses. Thus, prudent reporters and editors would have an incentive to avoid controversial stories vastly disproportional to the rewards

> they could expect for their diligence and industry in uncovering truthful but controversial stories, especially stories adverse to wealthy or powerful individuals. If such a state of affairs were to come to pass, the informed public would be the loser. [19a-20a]

On appeal, the California Court of Appeal, Second Appellate District, reversed the Superior Court's decision. It declined to follow those decisions which have held, in the context of jurisdictional questions relating to out-of-state publishers (and their employees) sued in libel actions, that First Amendment considerations require a greater showing of contacts to satisfy the Due Process Clause than is necessary in other, run-of-the-mill tort cases. (4a-5a) It instead concluded:

> Inasmuch as defendants Calder and South have no special First Amendment privilege by virtue of their status as employees of the publisher of the allegedly defamatory article herein, the right of a California court to assert personal jurisdiction over them must be determined in accord with traditional principles unaffected by First Amendment considerations. [5a]

Applying these "traditional principles," the appeals court found that Calder was subject to jurisdiction because he had committed an act outside California with the intent to cause a tortious effect in California. The court made the same finding with respect to South, but also found that South had other contacts with California sufficient to permit the assertion of jurisdiction over him.

ARGUMENT

The court below erred in refusing to take First Amendment considerations into account in assessing whether personal jurisdiction was proper in this action.

A. The Legal Analysis

In *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), this Court laid down the now familiar rule that:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken* v. *Meyer*, 311 U.S. 457, 463. *See* Holmes, J., in *McDonald* v. *Mabee*, 243 U.S. 90, 91.

326 U.S. at 316.[2] But, as far as the *amicus* is aware, this Court has never been called upon to interpret these due process guideposts in the context of a fact situation such as that posed by this case, involving non-residents whose business it is to gather and disseminate information and ideas to as wide an audience as possible and as to whom the jurisdictional claim is predicated on their very conduct of such business. AAP submits that such a fact setting (1) mandates a sensitive "minimum contacts" analysis, with due regard for the potential First Amendment impli-

2. As the Court subsequently noted, the "minimum contacts" rule serves at least two important functions: (1) "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum" and (2) "ensur[ing] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291-92 (1980).

cations of the assertion of jurisdiction, and (2) in light of the fundamental importance of the constitutional function to be served by the press, warrants a more substantial showing of contacts than might otherwise be required in contexts not involving the First Amendment.

These principles have been well articulated in a number of lower court opinions. Thus, in *New York Times Co.* v. *Connor*, 365 F.2d 567, 572 (5th Cir. 1966), the court recognized that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." The court's conclusion derived in substantial part from its concern that a publisher might discontinue distributing its works in a state where the size of its circulation did not balance the danger of exposure to liability for libel. *Id.* The court noted in this connection the undesirable impact that such a decision not to publish would have upon state residents who would be deprived of the opportunity to read the publication. *Id.*[3]

The fundamental recognition of the *Connor* decision—that in dealing with non-resident publishers and/or their

3. The *Connor* court rejected an inflexible view of the "minimum contacts" test, observing that consideration of First Amendment principles:

> is not intended for the convenience of individual publishers; nor does it ignore the resulting inconvenience to victims of libelous publications of limited distribution in their state. Rather, it is a recognition that jurisdiction based upon minimal contacts . . . when applied to the press will "limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties" and will "freeze out of existence" the distribution on a limited basis of publications espousing unpopular positions in a particular locale.

365 F.2d at 573.

employees, First Amendment considerations are relevant to the determination of whether due process requirements have been met—has been underscored in a number of subsequent decisions.[4] Likewise, later cases have held that, in the light of such First Amendment considerations, a showing of more substantial contacts with the jurisdiction than otherwise would be required is appropriate.[5]

Most recently, in *McCabe* v. *Jenkins and Associates, Inc.*, 531 F. Supp. 648 (E.D. Pa. 1982), the court, declining to permit a Pennsylvania resident to sue a California-based magazine publisher in Pennsylvania for defamation and invasion of privacy arising out of its publication of plain-

4. *See Cox Enterprises, Inc.* v. *Holt*, 678 F.2d 936, 937-38, *reh'g granted on other grounds*, 691 F.2d 989 (11th Cir. 1982) ("federal jurisdiction is subject to First Amendment considerations when a nonresident publisher is sued for libel"); *Edwards* v. *Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975) ("When a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed"); *Curtis Publishing Co.* v. *Golino*, 383 F.2d 586, 592 (5th Cir. 1967) ("first amendment considerations are a factor relevant to a determination of the jurisdictional question"); *Gonzales* v. *Atlanta Constitution*, 4 Med. L. Rptr. 2146, 2148 (N.D. Ill. 1979); *Johnston* v. *Time, Inc.*, 321 F. Supp. 837, 845-47 (M.D.N.C. 1970), *aff'd in part and vacated in part on other grounds*, 448 F.2d 378 (4th Cir. 1971); *cf. Buckley* v. *New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967) ("the First Amendment could be regarded as giving *forum non conveniens* special dimensions and constitutional stature in actions for defamation against publishers and broadcasters").

5. *See Edwards* v. *Associated Press*, 512 F.2d at 266 ("we have woven, in regard to entities clothed with First Amendment protections, a tighter due process net around state power than is true with regard to other entities"); *McCabe* v. *Jenkins and Associates, Inc.*, 531 F. Supp. 648, 654 (E.D. Pa. 1982) ("Courts confronted with this inherent tension between the first and fourteenth amendments to the Constitution have generally required a more substantial presence within the forum state in order to sustain *in personam* jurisdiction over publishers").

tiff's photograph, articulated the relevant First Amendment considerations as follows:

> The chilling effect that imposition of jurisdiction over any publisher would have on the free exercise of first amendment rights mandates a subtly different due process analysis. If a publisher stands in peril of being haled into court in any jurisdiction simply because a citizen of that jurisdiction came into possession of one of its publications, no speech would be disseminated beyond the territory in which the speaker can afford to litigate. Thus, if courts freely found *in personam* jurisdiction over publishers of first amendment articles under the same standards imposed on commercial entities, the citizens of each state would soon find themselves with access only to those publications with in-state revenues sufficiently high to justify the cost of litigation within that particular jurisdiction. In short, the legendary "free marketplace of ideas," a cornerstone of our constitutional scheme, would be transformed into a marketplace of ideas limited to those who can afford the cost of litigation in that particular marketplace.

531 F. Supp. at 654.

B. The First Amendment Interests at Stake

AAP believes from the experience of its members that the teaching of the cases discussed above is eminently sound. As previously noted, publishers are routinely subjected to costly and punishing libel litigation. It is burdensome enough for the publisher to be required to defend such actions in jurisdictions in which it may, from the substantiality of its activities, have some reason to expect it may be sued; it is impermissibly oppressive, however, to subject the publisher to such suits in remote jurisdictions with which it may have only the slightest business contacts.

Libel plaintiffs should not, as the decision below invites, be armed with a new weapon—the ability to "hale" a publisher and its authors and employees into court hundreds or perhaps thousands of miles from the publisher's principal place of business based solely upon the publisher's good fortune to have sold a small number of works in that jurisdiction.

Even worse, by "shopping" for a forum which has so little relationship to the publisher's activities, the libel plaintiff may well be seeking to take advantage of state rules, *e.g.*, relating to statutes of limitations, which are more liberal than those of the jurisdiction upon whose law the publisher normally depends. If allowed to succeed in doing so, libel plaintiffs would be thwarting the principles of comity enunciated by this Court by, in effect, substituting one state's view relating to lawsuits involving important constitutional issues for that of its sister states. *See World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 291-92 (1980).

Many of AAP's members, it is true, are "national" publishers in that they seek nationwide readership for their works. This does not, however, mean that they (or their authors, editors or employees) expect or enjoy a substantial business presence in each of the 50 states. Whatever the outcome under a traditional application of "minimum contacts" rules for a publisher whose works may be distributed only incidentally in a given state, it would impermissibly chill that publisher's interest in the broadest possible dissemination of its works were that publisher and its authors or employees amenable to suit in such state. The price, in terms of litigation risks, would simply outweigh the perceived benefits of wide readership. The problem is

exacerbated for smaller and regional publishers with even fewer regular sales in remote jurisdictions and, accordingly, expectations of—and likely less ability to defend against—lawsuits in such remote forums.

The nature of the distribution process for many book publishers' works makes the problem even more acute. Often, the publisher exercises no control over the locale of distribution of particular works after initial sale to its distributors. This being so as to such works, the publisher cannot simply stop selling in particular jurisdictions where it may not wish to take the risk of being sued. Its only recourse would be to refrain from creating the controversial material at all—a result wholly at odds with the goals of the First Amendment.

The publisher's plight is further aggravated in this context by its need for and reliance upon creative, talented and aggressive authors and editors willing to explore controversial subjects. Faced with the prospect of having to defend libel actions in remote jurisdictions, authors may choose either to seek publication of their works only on a local basis, to submit only the blandest, uncontroversial works to national publishers, or, worst of all, not to write on any provocative subjects at all. Because the author is even further removed from the channels of distribution than the publisher, he exercises little or no control over where his published works will be sold. Unless the decision below is reversed, the number of authors willing to write exciting, controversial works will surely contract.

AAP believes that it is insufficient to rely, as several courts have, on the notion that publishers are adequately

protected by the constitutional standards applicable to libel suits, *e.g.*, the requirement that a public official or public figure prove "actual malice" in order to prevail.[6] The disruption to the publishing process which results from having to defend a lawsuit on its merits, let alone the attendant costs, can be enormous. Conversely, if potential libel plaintiffs were required to demonstrate that a publisher has a substantial presence in a jurisdiction as a condition of maintaining suit there, the prospects of unnecessary and harassing litigations could be significantly lessened.

Conclusion

The requirements of the First Amendment dictate that special consideration be given to questions of personal jurisdiction that arise in the context of libel actions brought against non-resident publishers, their authors and employees. Because the court below failed so to recognize, its decision should be reversed.

Respectfully submitted,

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6. *See Church of Scientology* v. *Adams*, 584 F.2d 893, 899 (9th Cir. 1978); *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 316, 324 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977).